No. 76-517

In the Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD O. KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-3 to A-11) is reported at 540 F. 2d 990.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1976. A petition for rehearing with a suggestion of rehearing *en banc* was denied on September 13, 1976. The petition for a writ of certiorari was filed on October 13, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's false statements before the grand jury were material to its investigation.

2. Whether petitioner's grand jury testimony should have been suppressed because he was not told when he

appeared to testify that he was a target of the grand jury's investigation.

STATEMENT

Following a nonjury trial in the United States District Court for the Central District of California, petitioner was convicted of perjury before a grand jury, in violation of 18 U.S.C. 1623.[1] He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. A-3 to A-11).

The facts are set forth fully in the opinion of the court of appeals (Pet. App. A-3 to A-5). They show, in brief, that petitioner was a middleman regarding the sale by Ralph Kappler of a yacht and its ultimate purchase by William J. Cudd for $560,000 in promissory notes issued by the Baptist Foundation of America (BFA). When interest on the promissory notes held by Kappler was not paid, petitioner telephoned Kappler, said he was affiliated with BFA, and asked that Kappler push back the interest-due date. When Kappler refused, petitioner told him that the interest had been paid to Cudd.

Petitioner was subsequently called to testify before a federal grand jury investigating possible violations of federal law by petitioner and others resulting from the negotiation of worthless BFA promissory notes. He denied that he had telephoned Kappler or that he had requested Kappler to adjust the interest date on the BFA notes. This false testimony formed the basis of his perjury conviction.

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[1]Petitioner was indicted on two counts of perjury. The district court granted petitioner's motion for judgment of acquittal on the other count (Pet. App. A-3 n. 1).

ARGUMENT

1. Petitioner argues that the courts of appeals are in conflict over the standard of materiality and that under a standard more favorable to him than that utilized by the court below his false statements before the grand jury were not material.

The well-settled test of materiality in grand jury testimony, as originally set forth in *Carroll* v. *United States,* 16 F. 2d 951, 953 (C.A. 2), certiorari denied, 273 U.S. 763, is "whether the false testimony has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation * * *." See also *United States* v. *Devitt,* 499 F. 2d 135, 139 (C.A. 7), certiorari denied, 421 U.S. 975; *United States* v. *Lardieri,* 497 F. 2d 317, 319 (C.A. 3); *United States* v. *Percell,* 526 F. 2d 189, 190 (C.A. 9). Petitioner's false testimony was material under this standard. As the court of appeals noted, "one of the subjects of the grand jury's investigation was the extent of [petitioner's] involvement in the negotiation of BFA notes" (Pet. App. A-8). By denying that he had ever spoken to Kappler about the subject, petitioner "withheld from the grand jury direct evidence of the extent of his personal involvement" (*ibid.*).

Petitioner claims that other courts require a showing that, but for the untruthful testimony, further fruitful investigation by the grand jury would in fact have occurred. Two cases petitioner cites (Pet. 6), however, follow the traditional *Carroll* standard. See *United States* v. *Lasater,* 535 F. 2d 1041, 1047-1048 (C.A. 8), and *United States* v. *Beer,* 518 F. 2d 168, 171-172 (C.A. 5).[2] See also *United States* v. *Whimpy,* 531 F. 2d 768, 770 (C.A. 5).

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[2]In *Lasater,* the district court had found that the false testimony did not "tend to influence, mislead or hamper the grand jury in its investigation * * *" (535 F. 2d at 1046). Citing *Carroll,* the court of

United States v. *Birrell,* 470 F. 2d 113, 115 n. 1 (C.A. 2), and *United States* v. *Freedman,* 445 F. 2d 1220, 1226-1227 (C.A. 2), do contain language suggesting that the government must show that further investigation would in fact have occurred. In *Freedman,* however, a case involving false testimony before the Securities and Exchange Commission, the court cited *Carroll* approvingly (see 445 F. 2d at 1226). *Birrell* involved a false statement in an affidavit in support of a motion for leave to proceed *in forma pauperis* and for the appointment of counsel. The statement was held to be material, but it is by no means clear that the court believed that a correct answer would in fact have led to further inquiry into the defendant's financial status (see 470 F. 2d at 115 n. 1).

Even assuming that the language from these decisions states a test that is significantly different from the one applied by the court below, it would be of no avail to petitioner since his false testimony, interfering with the grand jury's investigation of his connection with BFA, was material under either the "could have" or "would have" formulation. Moreover, neither *Freedman* nor *Birrell* involved grand jury testimony, and the Second Circuit has stated that for that reason they may be distinguishable from cases such as the present one. *United States* v. *Doulin,* 538 F. 2d 466, 470 n. 3, certiorari denied, No. 76-25, October 18, 1976; see *United States* v. *Mancuso,* 485 F. 2d 275, 281 n. 17. Since the Second Circuit has not yet crystalized its views, there is no conflict among the circuits warranting this Court's review.

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appeals upheld this finding (535 F. 2d at 1047-1048). In *Beer*, a case involving a false statement by a bank officer in a Federal Deposit Insurance Corporation questionnaire, the court stated that materiality turns upon whether a statement "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made" (518 F. 2d at 171).

2. Petitioner also contends that his perjurious testimony should have been suppressed because he did not receive a "target" warning before testifying before the grand jury. This claim is forclosed by *United States* v. *Mandujano,* No. 74-754, decided May 19, 1976, which held that a witness cannot justify giving false testimony by the claim that the government improperly questioned him.

Petitioner asserts, however, that the decision below conflicts with *United States* v. *Jacobs,* 531 F. 2d 87, in which the Second Circuit, ruling not under the Constitution but in the exercise of its supervisory function, suppressed perjurious testimony on the ground that the defendant's failure to receive a target warning departed from the practice usually followed by federal prosecutors in the Second Circuit and created what in the court's view was an intolerable lack of uniformity. But in *Jacobs* this Court, on the government's petition for a writ of certiorari, vacated the judgment of the court of appeals and remanded for reconsideration in light of *United States* v. *Mandujano, supra* (No. 75-1883, order entered November 1, 1976).

To the extent that petitioner claims that the government's conduct in this case was somehow unfair (see Pet. 8-9), the facts here are in all relevant respects the same as those in *Mandujano.*[3] All of the participating Justices in that case agreed, not only that the privilege against compelled self-incrimination provides no protection for

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[3]Prior to being questioned, petitioner was told that the grand jury believed that he had information concerning its inquiry into violations of federal mail and wire fraud statutes, "in addition to other possible violations" (Pet. App. A-6 to A-7 n. 6). He was also informed of his right to refuse to answer incriminating questions and he was told that he could consult an attorney outside the courtroom. Finally, he was reminded of his obligation to respond truthfully to any question he answered, and warned that false testimony could result in perjury charges (*ibid.*).

the crime of perjury, but also that the government's conduct had not deprived the defendant of due process.[4]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1976.

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[4]Plurality opinion, p. 12; concurring opinion of Mr. Justice Brennan, p. 1; concurring opinion of Mr. Justice Stewart, p. 1.

There is no reason to hold this petition pending the decision in *United States* v. *Washington*, No. 74-1106, certiorari granted June 1, 1976, or in *United States* v. *Wong*, No. 74-635, certiorari granted June 1, 1976. *Washington* presents the different issue of whether the government's failure to give a "target" warning bars the use of the witnesses' grand jury testimony in a subsequent prosecution, not for perjury, but for the substantive offense that was the subject of the grand jury investigation. *Wong* does involve a perjury prosecution; we have argued in our brief in that case that it is controlled by *United States* v. *Mandujano*. In any event, the only respect in which *Wong* differs from *Mandujano*—Wong did not understand the warnings regarding the privilege that were given; Mandujano did—would not avail petitioner, since there is no suggestion here that he did not understand the warnings regarding the privilege that he received.

We are sending petitioner's counsel a copy of our briefs in *Wong* and *Washington*.